



# STATE OF INDIANA

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November 28, 2012

Mr. Jason M. Aubry  
53550 Generations Drive  
South Bend, Indiana 46635

*Re: Formal Complaint 12-FC-327; Alleged Violation of the Access to Public Records Act by the City of South Bend*

Dear Mr. Aubry:

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Aladean M. DeRose, Attorney, responded on behalf of the City. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on October 15, 2012, you submitted a written request to inspect records of the City. Specifically, you requested to inspect, "ledgers for all budgetary accounts/funds managed by the Mayor's Office from January 1, 2012 to October 1, 2012 (or September 30, 2012 whichever is more appropriate) in order to track spending of taxpayer dollars both in and out of town. Also, any/all credit card statements from the same time period for cards issued to the Mayor and/or his staff."

On October 22, 2012, you were informed by the Manager of the City Attorney's Office that the records were compiled and required approval by the interim-city attorney. The approval was to be conducted the following day. On October 23, 2012, you were informed that the records were not finished and the City required a few more days to compile the records. On October 26, 2012, you were informed that the compilation of files was not complete and would be finished no later than October 29, 2012. On October 29, 2012, you were informed that the City would need until November 2, 2012 to provide all records. On November 2, 2012, your inquiries to the Mayor's Office regarding the status of your request were not returned. As of November 5, 2012, you still have yet to receive any records that are responsive to your request.

In response to your formal complaint, Ms. DeRose advised that at no time did the City deny, nor did it convey to you its intent to deny, access to the records that had been requested. On November 14, 2012, the City provided all records responsive to your

original request. You thereafter clarified certain portions of your original request in written correspondence that was submitted to the City on November 19, 2012. On November 21, 2012, the City provided you with documents responsive to your clarification, which you retrieved on November 26, 2012. Ms. DeRose provided that the information sought was located within two City Departments, the Controller's office and the Mayor's office. During the pendency of your request, the Controller was deeply engaged in the City's budget process, which required several Common Council committee meetings which the Controller was required to attend. The budget did not pass until October 29, 2012. Thereafter, the Controller was out of the office and did not return until November 15, 2012.

## ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records

Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As applicable here, your original request for records was received by the City on October 15, 2012; your subsequent request was submitted on November 19, 2012. The City produced all records responsive to both requests on November 14, 2012 and November 21, 2012. Ms. DeRose advised that the City was required to gather the information from two City Departments, the Mayor's office and the Controller's office. The Controller during the time of your request was engaged in the City's budget process, which was not ultimately approved until October 29, 2012. Thereafter, the Controller was out of the office until November 15, 2012. The City was responsive to your calls and inquiries regarding the status of your request up to November 2, 2012. At no time did the City deny your request, signify its intent to deny your request, and has now provided all records that are responsive to your request. As such, it is my opinion that the City has complied with the requirements of section 3(b) of the APRA in providing all records that were responsive to your request in a reasonable period of time.<sup>1</sup>

#### CONCLUSION

For the foregoing reasons, it is my opinion that the City has complied with the requirement of I.C. § 5-14-3-3(b) in providing all records in response to your requests in a reasonable period of time.

Best regards,



Joseph B. Hoage  
Public Access Counselor

cc: Aladean M. DeRose

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<sup>1</sup> I would note for all public agencies that if you convey to a requestor that records responsive to a request will be provided on a specific date and for regardless of the reason, the agency is unable to fulfill this obligation; the agency should take the initiative and inform the requestor that there has been a delay. While failing to take such steps does not automatically conclude that the agency has violated section 3(b) of the APRA, many of the issues raised regarding the timeliness of an agency's response can be alleviated by acting in such a fashion. *See Opinion of the Public Access Counselor 11-FC-260*.